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ALEXANDER L. STEVAS,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-1994

THE NASH COUNTY BOARD OF EDUCATION,

PETITIONERS

versus

THE BILTMORE COMPANY; BORDEN, INC.;
COBLE DAIRY PRODUCTS COOPERATIVE, INC.;
PET, INC.; AND FLAV-O-RICH, INC.,
FOR ITSELF AND AS SUCCESSOR IN INTEREST
OF UNITED DAIRIES, INC.,

RESPONDENTS

Petition for a Writ of Certiorari to the
United States Court of Appeals for
the Fourth Circuit

Hamrick & Hamrick
J. Nat Hamrick, Esq.
Counsel for Petitioner
P. O. Box 470
Rutherfordton
North Carolina 28139

QUESTIONS PRESENTED FOR REVIEW

Can the nebulous doctrine of privity be used to support a res judicata holding which deprived every school board in North Carolina of its right to seek treble damages under the anti-trust laws of the United States when the United States Court of Appeals held the school boards were not "parties" to the action relied on as a bar, which action was brought by the Attorney General of North Carolina.

1st. Seeking to enjoin the defendants from violating the state anti-trust laws and to recover damages for the state itself;

2nd. Seeking to represent all the school boards of North Carolina as their class representative for the purpose of recovering treble damages for them;

AND WHEN the action was terminated by a consent injunction, signed by the state only, requiring the defendants to refrain from violating the North Carolina anti-trust laws in the future;

AND WHEN no notice was ever given to the school boards that action was pending, no settlement was ever discussed with them, no class was ever formed, no class notice was ever sent out, no money was recovered for them;

AND WHEN they did not consent to the injunction;

AND WHEN the Attorney General informed the defendants that he was settling the case on behalf of the state and was not settling the treble damage claim of the school boards and if they wished to bind the school boards, he would have to give the boards notice, form the class, and hold hearings on any proposed treble damage settlement for the school boards; (appendix p. 118)

And when the defendants replied that they did not wish to do this and would "take their chances on the treble damages claim"? (appendix p. 118)

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North Carolina 28139

GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED ARE:

1. The decisions below are in direct conflict of the case of Equal Employment Opportunity Commission v. D. H. Holmes Co., Ltd., 556 F. 2d 787, because Plaintiffs - all the city and county school boards in North Carolina who were potential class members were held to be bound under the theory of res judicata by the results of a case brought by the State of North Carolina in the State Court when no class was ever formed - no notice was ever sent out - no settlement was ever discussed with them and no money was recovered for them, and when they were named in the Complaint as class members and the Attorney General of North Carolina only sought to represent them as class representative. (Emphasis added).

2. The decision in this case is in direct conflict with the Lyons v. Westinghouse Corp., 222 F. 2d 184 (2nd Cir., 1955) cert.

den.345 U.S. 923, 73 S.Ct. 781, 97 L.Ed. 1354 (1953), and Cream Top Creamery v. Dean Milk Co., 383 F.2d 358 (6th Cir., 1967) because an action brought by the Attorney General of North Carolina in the state court under state law, and terminated by an injunction consented to only by the State, was held to bar plaintiffs from asserting a treble damage claim under the laws of the United States, when plaintiffs were not parties to the state action--had no notice of that action, and neither consented to the injunction nor received any money from that settlement.

3. The decisions below resulted in depriving every school board of North Carolina of their right to come into Court and have their anti-trust claim adjudicated in violation of their constitutional right and due process of law under the 5th Amendment and the Constitution of the United States.

(i) The date of the decision of the United States District Court for the Eastern

District of North Carolina is November 27, 1978, and is reported in 464 Fed. Supp. 1027, Civil Action No. 76-0188-CIV-S.

(ii) The date of the decision by the United States Court of Appeals for the Fourth Circuit is January 12, 1981, and is reported in 640 F.(2d) 484.

(iii) The date of the denial of the Petition to Rehear is February 19, 1981.

(iv) The statutory provision believed to confer on this Court's jurisdiction to review the judgment below by writ of certiorari is 28 U.S.C. 1254(1).

(f) The Constitutional provision and statutes which this case involves are:

Amendments V and XIV to the Constitution of the United States.

15 U.S.C. §1-15.

Rule 23 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

The original jurisdiction of this action in the United States District Court for the Eastern District of North Carolina is based on the Anti-Trust Laws of the United States, 15 United States Code §1, 2, 15.

The Attorney General of North Carolina brought suit against the defendants under Chapter 75 of the North Carolina Statutes entitled "Monopolies, Trusts, and Consumer Protection."

In that suit he stated two causes of action:

1. He sought to enjoin the defendants from further violation of the North Carolina laws against price fixing and to recover damages for the state itself.

2. He sought to represent all the school boards of North Carolina as their class representative under Rule 23 of the North Carolina Rules of Civil Procedure entitled "Class Action." (appendix p. 87)

Before all the defendants had filed answers he settled the case on behalf of the State only by a consent injunction which required the defendants to refrain from violating the laws of North Carolina in the future. The consent order was signed for the State by the Attorney General and by the defendants. (appendix p.104)

The Attorney General did not purport to settle the treble damage class action for the school boards and so informed the defendants. He also told defendants that if they wished to settle the treble damage class action for the school boards he would have to give the school boards notice, form the class, and hold hearings on any proposed settlement of their treble damage class action. The defendants replied that they did not wish to do this and would take their chances on the treble damage class action of the school boards. (appendix p.118)

The Attorney General wrote the school

boards informing them of the injunction and stating that he had not settled their treble damage action. This was the first notice the school boards had of the Attorney General's action.

Later, the Nash County Board of Education brought the instant action under Rule 23 of the Federal Rules of Civil Procedure on behalf of itself and as class representative of all the school boards in the state.

The defendants pleaded res judicata. The District Court found that the school boards were "parties" to the State's former case and entered summary judgment for the defendants. The United States Court of Appeals for the Fourth Circuit affirmed, saying that the school boards were not "parties" to the former State case, but were in "privity."

When plaintiffs' petition to rehear was denied, this petition was filed.

ARGUMENT

Plaintiffs feel that an examination of the pertinent parts of the state's Complaint, the Consent Judgment, and the Complaint in this action will show that the Fourth Circuit was in error when it sustained defendant's pleas of res judicata.

The pertinent paragraphs of the state's action reads as follows:

"B. JURISDICTION AND VENUE

3. This is a civil antitrust action seeking permanent injunctive relief as provided for in G.S. §75-14 and money damages as provided in G.S. §75-16, against each of the defendants, jointly and severally, as named in paragraph 2 above. (appendix p. 87)

C. CLASS ACTION REQUESTED

4. (a) This action is brought on plaintiff's own behalf as a direct purchaser of fluid milk from the defendants and as one

of the sources of revenue used to pay part of the purchase price of fluid milk by the various public school systems of North Carolina; and as the class representative of a class of 'persons' described below, which have purchased fluid milk from the defendants, as is authorized by Rule 23(a), N.C. Rules of Civil Procedure. (appendix p. 87)

(b) The class of persons which have purchaed fluid milk from the defendants, which plaintiff seeks to represent in this action, in addition to itself, are described as follows: each public school system in this state . . . (appendix p. 88)

I. PRAYER

1. Wherefore, plaintiff prays:

(a) This action be tried before a jury.

(b) This action be determined a class action within Rule 23 of the N.C. Rules of Civ. Procedure...

(e) That plaintiff, and the class it represents, recover of the defendants treble damages for the injuries suffered by plaintiff and the class it represents, as provided for by G.S. §75-16..." (appendix p. 94)

The pertinent parts of the Consent Injunction reads as follows:

"IT FURTHER APPEARING to the Court that:

1. The State of North Carolina instituted this action pursuant to the provisions of G.S. 75-14, 75-15, and 75-16 and alleged violations of G.S. 75-1, 75-1.1, and 75-5... (appendix p. 97)

NOW, THEREFORE, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and upon the consent of the parties hereto, it is hereby... (appendix p. 98)

CONSENTED TO:

STATE OF NORTH CAROLINA, ex rel.

RUFUS L. EDMISTEN, Attorney General

By: /s/ Rufus L. Edmisten

FLAV-O-RICH, INC.

JORDAN, WRIGHT, NICHOLS, CAFFREY & HILL, Attorneys

BROOKS, PIERCE, McLENDON, HUMPHREY & LEONARD, Attorneys

By: /s/ Welch Jordan" (appendix p. 104)

The pertinent parts of the instant Complaint read as follows:

"DESCRIPTION OF PLAINTIFF AND CLASS

1.

...(b) Plaintiff brings this action as a class action under Rule 23 of the Federal Rules of Civil Procedure on behalf of itself and all other County and City Boards of Education as described in Chapter 115 of the General Statutes of North Carolina located in the State of North Carolina..." (app. p. 106)

The Petitioner respectfully calls to the attention of the Court some inadvertent mistak as to the facts which Petitioner believes may have led the Circuit Court to affirm.

On page 7 of the opinion, the Court said

that the Attorney General of the State of North Carolina was a party plaintiff, when in fact the State of North Carolina was a party plaintiff (Appendix, page 52). In its opinion, the Court states:

"The parties were, as we have already noted, 'every public school system in the state'." (Appendix, page 84).

This statement is in error, as is shown in the State's Complaint where the State says that it is bringing the action on its own behalf... and as "the class representative of the school boards". (Appendix, page 87).

This clearly shows that the State of North Carolina sought to represent the school boards only as their class representative under Rule 23 of the North Carolina Rules of Civil Procedure.

There is absolutely no contention that Rule 23 was complied with.

Rule 23(b) of the Federal Rules of Civil Procedure reads as follows:

"An action may be maintained as a class

action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests," (Emphasis added).

It is now perfectly apparent that the very thing that is sought to be prevented by the utilization of the class action happened in this case. The class representative, the State of North Carolina, even though it did its best to prevent the result which the

decision of the Courts below have produced by use of the nebulous doctrine of "privity," foreclosed all action by the city and county Boards of Education to recover millions of dollars illegally taken from them by the defendants' price-fixing agreements. This, in spite of the fact that the Boards of Education, who knew nothing about the State's action, are prevented from discharging their legal responsibility under North Carolina law as defined in North Carolina G.S. 115-31(a);

"A county or city board of education shall institute all actions, suits, or proceedings against officers, persons, or corporations, or their sureties, for the recovery, preservation, and application of all money or property which may be due or should be applied to the support and maintenance of the schools. . . ."

In addition to the obvious injustice of the opinions below, this case should be reviewed because it is in direct conflict with:

FIRST The rights of the plaintiffs under the Fifth and Fourteenth Amendments to the Constitution of the United States.

SECOND It is in direct conflict with the law and the public policy of the United States which unequivocally states that the jurisdiction to enforce the anti-trust laws of the United States resides exclusively in the courts of the United States.

This proposal is fully stated in the following cases. Judge Learned Hand's decision in Lyons v. West Corp., 222 F(2d) 184 (Second Circuit 1955), cert. denied, 345 U.S. 923, 73 Sup.Ct. 781, 97 L.Ed. 1354 (1955), where he states on page 189 of the Circuit Court decision:

". . . [T]he grant to the [federal]

districts courts of exclusive jurisdiction over the action for treble damages should be taken to imply an immunity of their decisions from any prejudgment elsewhere . . . two thirds of the recovery is not remedial and inevitably presupposes a punitive purpose. . . . There are sound reasons for assuming that such recovery should not be subject to the determinations of state courts. It was part of the effort to prevent monopoly and restraints of commerce; and it was natural to wish it to be uniformly administered, being rational in scope."

The Sixth Circuit in its opinion in Cream Top Creamery vs. Dean Milk Co., 383 F(2d) 358 (6th Circuit 1967) forcefully restates the same law on page 363 of that opinion:

"Assuming for the sake of argument that the complaints in the Cherokee case, the State Court action, and the Cream Top

case, the Federal Court action, allege the same basic wrongs, the decision of the District Court nevertheless cannot stand. Under 15 U.S.C. Section 15 Congress gave exclusive jurisdiction to the Federal District Court over wrongs committed under the Anti-Trust acts. . . .

It is apparent that the case relied on by the District Court, Englehardt vs. Bell & Howell Co., 327 F.(2d) at 30 (8th Circuit 1964), to support its holding in this case has no application to the facts of this case as is shown by the following quote from that opinion (page 35):

"[I]n Englehardt the plaintiff had brought three previous actions under the Missouri anti-trust statute against the same defendant. Each action had been removed to federal court. The cases were all dismissed, the third being dismissed with prejudice. . . .

"The court noted that in each of the four actions the parties and wrongs pleaded were identical. In upholding the lower court's dismissal on the basis of res judicata the appellate court noted that: 'We are not faced with the Lyons' problem here since all the early adjudications were made in the federal district court in actions over which the federal court had unquestioned jurisdiction. No issue of state court decisions fettering the power of the federal court to exercise exclusive jurisdiction in federal anti-trust actions is here presented.'" (emphasis added)

THIRD. It is in direct conflict with all the cases which so scrupulously protect the rights of absent class members. This is very lucidly set forth in Pettway v. American Cast Iron Pipe Co., 576 F(2d) 1157, rehearing denied, 581 F(2d) 267, cert. denied, 99 Sup.Ct. 1020, 439 U.S.

1115, 59 L.Ed. 74 (1978).

FOURTH. By its holding in this case the Court of Appeals has rendered an opinion which plaintiffs respectfully submit is against the public policy of the United States and against the facts of this case.

The federal anti-trust laws are among the most important laws in the United States. These legislative mandates form a basic framework for the American economic system. In light of this important public policy, oriented toward the prevention of monopolistic practices, it is important that courts strictly construe the doctrine of res judicata when considering the application of this doctrine against a litigant pursuing an action under these federal laws.

The importance of this policy on which federal anti-trust laws are grounded is discussed in Lawlor v. National Screen Service Co., 349 U.S. 322, 75 S. Ct. 865, 99 L.Ed. 1122 (1954), where the Court, in

rejecting the defense claim of res judicata on theory that the second suit involved the same class action as the first suit, stated that "particularly is this so in view of the public interest in vigilant enforcement of the anti-trust laws through the instrumentality of the private treble damage action." * (at 329, 869, 1128).

Lawlor, supra., seems to indicate that precise findings of same parties and same cuase of action must be made prior to the barring of an action under federal anti-trust law. Such precise findings were not made in the lower court's Memorandum in this cause. Indeed, that Memorandum is replete with question marks and ambiguities. Yet each uncertainty was resolved in favor of barring plaintiff's cause of action. This memorandum endows the Attorney General with more power than any statute or common law in North Carolina allows. This memorandum endows the Attorney General, by implication, with the intent to bar the plaintiff from further causes of action when no such intention is evident from any of the materials existing with reference to this issue. Each ambiguity present in this action has been resolved in favor of repressing the rights of this plaintiff to enforce federal anti-trust laws. This is true when, in fact, public policy demands that these laws be actively prosecuted.

See also the Annotation at 88 L. Ed. 389 which notes that res judicata should not be utilized to encourage the continued misuse of a patent privilege in violation of anti-trust laws and Addressograph v. Cooper, 156 F. 2d 483 (2d Cir., 1946).

In many instances, the Memorandum of the district court candidly admits that uncertainties exist as to whether, in fact, this plaintiff's action should be barred under the doctrine of res judicata. In finding that the Board of Education is the "same party" as the Attorney General, the court noted that despite the plaintiff's citation of statutes, caselaw and customary practices granting to boards of education the independent authority to sue and be sued, "principles of judicial restraint...require that the court read these provisions narrowly and give effect to the Attorney General's broad common law authority." (App. page 31). But plaintiff respectfully urges that such an ambiguity should be resolved in favor of due

process of law and federal policy favoring enforcement of the anti-trust laws. Furthermore, in the court's Memorandum no finding ever was made that the Attorney General indeed sought to represent the boards of education. Instead, based on a finding that the Attorney General had the authority to represent the boards of education, the Judge found that the boards were in fact so represented. (App. page 23). (Emphasis added).

With reference to whether this cause of action constitutes the same cause of action as was entertained by the Attorney General in state court, the district court acknowledged that not all criteria were met which should be examined in determining whether two cases, one under federal law and one under state law, constituted the same cause of action for the purposes of res judicata. However, again the court chose to "defer to what in this case are the more compelling dictates of res judicata" i.e. "the strong interest in finality". (App. page 20).

The public policy considerations of neither federal anti-trust laws nor res judicata are met in barring the litigation efforts of a a plaintiff who has never previously appeared before any court in vindication of its losses caused by another's violation of federal anti-trust laws.

It is apparent that the city and county Boards of Education could not be bound by the consent injunction because under Rule 23 of the North Carolina Rules of Civil Procedure is found the identical provision stated in Rule 23(e) of the Federal Rules of Civil Procedure, which provides:

"(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall

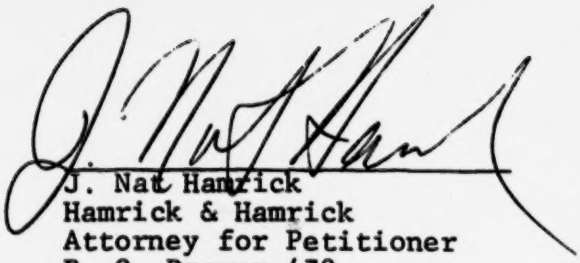
be given to all members of the class in such manner as the court direct."

CONCLUSION

It is respectfully submitted that no legalistic interpretations and distinctions should be allowed to leave millions of dollars of illegal gains in the hands of price-fixers who violated the anti-trust laws of the United States and gave absolutely nothing for the judgment they plead as res judicata except their promise not do it again.

The Anti-Trust Laws of the United States should not be rendered impotent by persons who coldly and clearly violate those laws - consent to an injunction - and they say they will "take their chances" rather than give fundamental due process to the school boards and children form whom they have illegally taken millions of dollars.

Respectfully submitted,



J. Nat Hamrick
Hamrick & Hamrick
Attorney for Petitioner
P. O. Drawer 470
Rutherfordton, NC 28139
Telephone 704/287-3359

William L. Thorp
Thorp, Anderson & Slifkin
P. O. Box 470
Raleigh, NC 27602
Telephone 919/828-2467

I. T. Valentine, Jr.
Valentine, Adams & Lamar
109 North Court Street
Nashville, NC 27856
Telephone 919/459-7141

Certificate of Service

This is to certify that the undersigned, a member of the bar of this Court, served this Petition for a Writ of Certiorari and Appendix thereto upon all of the parties to this action by depositing at least three copies of the Petition and three copies of the Appendix in the United States mail addressed to the attorneys whose names and post office addresses are:

George Ward Hendon, Esq.
Adams, Hendon & Carson
901 First Union National Bank Bldg.
Asheville, North Carolina 28807

Joseph W. Gladden, Jr., Esq.
King & Spalding
2500 Trust Company Tower
Atlanta, Georgia 30303

Attorneys for Biltmore Co., Inc.

Fred D. Turnage, Esq.
Cleary, Gottliev, Steen & Hamilton
1250 Connecticut Avenue
Washington, D. C. 20036

Robert H. Duesenberg, Esq.
Pet Incorporated
Pet Plaza
400 South Fourth Street
St. Louis, Missouri 63166

Wright T. Dixon, Jr., Esq.
Bailey, Dixon, Wooten, McDonald & Fountain
P. O. Box 2246
Raleigh, North Carolina 27602

Attorneys for Pet Incorporated

John R. Jordan, Esq.
P. O. Box 709
Raleigh, North Carolina 27602

David L. Aufderstrasse, Esq.
Chadwell, Kayser, Ruggles, McGee & Hastings
8500 Sears Tower
233 S. Wacker Drive
Chicago, Illinois 60606

Theodore L. Banks, Esq.
Draft, Inc.
Draftco Court
Glenview, Illinois 60025

Attorneys for Kraft, Inc.

W. T. Covington, Jr., Esq.
John M. Murchison, Jr., Esq
Kennedy, Covington, Lobdell & Hickman
3300 NCNB Plaza
Charlotte, North Carolina 28280

Glenn S. Dennis, Esq.
House Counsel
Borden, Inc.
180 East Broad Street
Columbus, Ohio 43215

Attorneys for Borden, Inc.

Joseph H. Leonard, Esq
Leonard and Snyder
P. O. Box 614
Lexington, North Carolina 27292

J. Melville Broughton, Jr.
Broughton, Broughton, McConnell & Boxley, P.A.
P. O. Box 2387
Raleigh, North Carolina 27602

Attorneys for Coble Dairy Products

Henry A. Mitchell, Jr., Esq.
Smith, Anderson, Blount & Mitchell
P. O. Box 750
Raleigh, North Carolina 27602

Attorneys for Pine State

Jerry W. Amos, Esq.
Brooks, Pierce, McLendon, Humphrey & Leonard
P. O. Drawer U
Greensboro, NC 27402

William A. Carey, Esq.
Barnett, Alagia & Carey
1725 DeSales Street, N.W.
Washington, D.C. 20036

D. Paul Alagia, Jr., Esq.
Barnett & Alagia
P. O. Box 1179
Louisville, Kentucky 40201

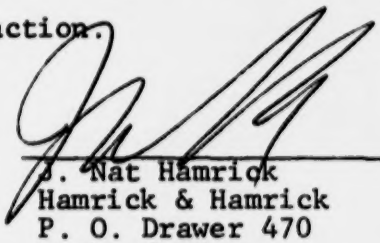
Attorneys for Flav-o-Rich

This 18 day of May, 1981.

J. NAT HAMRICK
Hamrick & Hamrick
P.O. Drawer 470
Rutherfordton,
North Carolina 28139
(704) 287-3359

Entry of Appearance

J. Nat Hamrick, Attorney for Petitioner, does hereby enter his appearance in this Court for the purpose of representing Petitioner in this action.



J. Nat Hamrick
Hamrick & Hamrick
P. O. Drawer 470
Rutherfordton
North Carolina 28139
(704) 287-3359